

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

TEMP-AIR, INC.

and

Case 18-CA-128364

TEAMSTERS LOCAL 970

*Chinyere C. Ohaeri, Esq. and
Nicholas S. Heisick, Esq.,
for the General Counsel.*

*Mr. James A. Korn,
for the Respondent.*

*Kevin M. Beck, Esq.,
for the Charging Party.*

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in Minneapolis, Minnesota, on November 4, 2014. Teamsters Local 970 (the Union) filed the charge on May 9, 2014,¹ and the General Counsel issued the complaint on July 3. The complaint alleges that Temp-Air, Inc. (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by refusing to execute an agreement.² (GC Exh. 1(c).) Respondent timely filed an answer to the complaint denying the alleged violation of the Act. (GC Exh. 1(e).) Respondent later filed an amended answer. (GC Exh. 1(h).) At the hearing, the General Counsel amended the complaint to add allegations that Respondent committed a *Johnnie's Poultry* violation and denigrated the Union; Respondent denied these allegations. The parties were given a full opportunity to participate, to introduce relevant evidence, to examine and cross-examine

¹ All dates are in 2014, unless otherwise indicated.

² Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's Exhibit; "GC Exh." for General Counsel's Exhibit; "U. Exh." for the Union's Exhibit; "Jt. Exh." for Joint Exhibit; "R. Br." for Respondent's brief; and "GC Br." for the General Counsel's brief.

witnesses, and to file briefs. On the entire record, including my own observation of the demeanor of the witnesses,³ and after considering the briefs filed by the parties, I make the following

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FINDINGS OF FACT

I. JURISDICTION

Respondent, a Minnesota corporation, is engaged in manufacture, service, and sales of heating, ventilation, and air-conditioning (HVAC) equipment at its facility in Burnsville, Minnesota, where it annually purchases and receives goods valued in excess of \$50,000 directly from points outside the State on Minnesota. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

Respondent manufactures and rents HVAC equipment, mostly for commercial construction and industrial purposes. (Tr. 12.) Respondent's headquarters are in Burnsville, Minnesota, but Respondent also operates facilities in other cities, including Portland, Denver, Chicago, Milwaukee, Detroit, Boston, Philadelphia, and Orlando. (Tr. 16.) A group of investors bought Respondent through a stock purchase in 2007. (Tr. 17, 18.) James Korn, Respondent's CEO, is also an 18-percent owner of Respondent.⁴ Respondent admits, and I find, that Korn is a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

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Teamsters Local 970 (the Union) represents a unit of employees at Respondent's Burnsville facility. (GC Exh. 1(h); Tr. 19.) Respondent has recognized the Union as the sole and exclusive bargaining agent for the purpose of collective bargaining for the following appropriate unit of employees: all full-time manufacturing and service employees of the Respondent located at its Burnsville, [Minnesota] facility. (GC Exh. 1(h); Jt. Exh. 1; Tr. 7-8.)

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³ Although I have included citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. I further note that my findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

⁴ Korn testified under a subpoena issued by the General Counsel, but did not testify as part of Respondent's case. In general, I did not find Korn to be a credible witness. He frequently quibbled with counsel for the General Counsel and answered her questions with a question. (Tr. 27, 38-39, 42-43.) His trial testimony was impeached with his pretrial affidavit testimony on six occasions during only 32 pp. of testimony. (Tr. 24-25, 26-27, 31-32, 32-33, 34-35, 36-37.) Moreover, when counsel for the General Counsel said that Korn had a copy of Darryl Johnson's affidavit in his hand, he replied, "How do you know what I have in my hand?" (Tr. 214.) He only admitted that he had Johnson's affidavit in his hand when I specifically asked him. (Tr. 214.) Therefore, I did not credit Korn's testimony.

Michael Kuta is the Union's business agent and president. (Tr. 51.) As business agent, Kuta negotiates and ensures compliance with contracts. (Tr. 52.) Kuta became responsible for the Union's contract with Respondent in 2010.⁵ (Tr. 53.)

5 Most recently, Respondent and the Union were bound by a collective-bargaining agreement in effect from August 1, 2010, until the agreement expired on July 31, 2013 ("expired contract" or "expired agreement"). (Jt. Exh. 1.) Korn and Kuta both signed this agreement.⁶ (Jt. Exh. 1.) Relevant sections of the expired agreement state as follows:

10 Sec. 3.06 Supervisors shall be permitted to perform manufacturing and/or service work when necessary to meet the business needs of the Employer.

15 Sec. 8.11 Discipline and Discharge: (a) The Employer will provide a copy of any written warning notice, including a suspension notice or any other progressive disciplinary notice, to the Employee and the Chief Steward within 5 working days of the event giving rise to the disciplinary action or upon conclusion of the investigation of the incident giving rise to the disciplinary action, whichever occurs later. If the investigation of the incident requires more than five working days, the Employer will notify the steward of that fact.

20 Sec. 12.01 All differences, disputes and grievances that may arise between the Union and the Company relative to the interpretation . . . of this Agreement shall be taken up as follows: [through the parties' grievance and arbitration procedure.]

25 Sec. 13.01 The minimum hourly rates of pay for the various classifications shall be shown on Exhibit "A" attached hereto. The Employer may, in its discretion, accelerate any step in the pay progression for any individual Employee. Acceleration at one step does not require that the Employer accelerate subsequent steps. Whether a pay progression step was paid at a proper time in accord with
30 the minimum requirements of Exhibit "A" is determined by reference to the Employee's start date, not by reference to the immediately preceding step.

35 Sec. 13.02 The Union and the Employer agree that the classification schedule (Exhibit A) may require adjustments from time to time during the life of this Agreement to meet the requirements of production changes and modifications.

Sec. 15.02 Employees who are in the employment of the Employer on the effective date of this Agreement and who have completed 90 days of employment by the effective date are eligible for coverage under the [Minnesota Teamsters

⁵ I found Kuta to be the most credible witness at the trial. He testified in a forthright and steady manner. His testimony was not effectively contradicted by Respondent's witnesses or evidence. He did quibble with Korn on cross-examination and candidly admitted that he "manufactured" R. Exh. 1 (discussed below). Nevertheless, I do not find that these issues detract from his overall credibility and I credit Kuta's testimony over that of other witnesses.

⁶ As is alleged in the instant case, Korn refused to sign the tentative agreement reached by the Union in 2010, after which Kuta filed a charge with the Board. (GC Exh. 8; Tr. 88-89.) The parties, however, resolved their differences after further bargaining. (Tr. 87-91.)

Health and Welfare] Plan on the effective date. Employees who are in the employment of the Employer on the effective date of this Agreement but who have not completed 90 days of employment by that date shall become eligible for coverage under the Plan on the first Monday following the Employee's completion of 90 days of employment. An employee hired after the effective date of this Agreement shall become eligible for coverage not earlier than the first Monday following the Employee's completion of 90 days of employment.

During the term of this Agreement, the weekly cost of insurance coverage to the Employees will be as follows, for the contract years beginning on the dates stated:

	<u>August 1, 2010</u>	<u>August 1, 2011</u>	<u>August 1, 2012</u>
Employees enrolled for single coverage on the Employer's records on August 1, 2004	\$50	\$60	\$70
Employees enrolled for family coverage on the Employer's records on August 1, 2004	\$63	\$73	\$83
Employees who enroll for any coverage, single or family, after August 1, 2004	\$63	\$73	\$83

If the weekly premium for the Minnesota Teamsters Health and Welfare Plan exceeds the weekly premium amount stated below for the respective contract years, the participating Employee shall pay, in addition to the weekly Employee payment set forth above, the entire amount of the difference between the actual weekly premium and the weekly premium stated below.

Contract year beginning:	<u>August 1, 2010</u>	<u>August 1, 2011</u>	<u>August 1, 2012</u>
Weekly premium:	\$236.70	\$246.70	\$256.70

(Jt. Exh. 1.)

Hourly pay rates and a wage progression scale for members of the bargaining unit were specified and contained in an attachment to the expired contract entitled "Exhibit A." (Jt. Exh. 1.) During the term of the expired agreement, the parties agreed to freeze the wage progression scale; this agreement is memorialized as an attachment to the expired contract entitled "Exhibit B." Id.

The expired agreement also had a section (sec. 8.10) dealing with funeral leave. (Jt. Exh. 1.) Under section 8.10, employees were allowed a certain number of leave days per year for the purpose of attending the funeral of an immediate family member. Id. The definition of

immediate family member included spouses, children, stepchildren, parents, and parents-in-law. Id.

5 During negotiations for a successor agreement, Korn acted as Respondent's lead negotiator and Kuta acted as the Union's lead negotiator. (Tr. 21, 54.) The parties had four bargaining sessions before reaching a tentative agreement for a new contract. (GC Exh. 2.)

B. July 22, 2013 Initial Bargaining Session and Preceding Events

10 On May 16, 2013, the Union sent a letter to Respondent seeking to bargain for a new agreement. (Jt. Exh. 2a.) After sending his letter to Respondent, Kuta met with the bargaining unit to discuss changes they would like to see in the new contract. (Tr. 55.) Kuta and Korn exchanged phone calls, letters, and emails regarding the scheduling of meeting dates, places, and times. (Jt. Exh. 2b-e; Tr. 55-56.) However, no proposals were exchanged between the parties or
15 discussed prior to the first bargaining session. (Tr. 56.)

On July 22, 2013, the parties met for their first bargaining session at Respondent's Burnsville facility.⁷ (GC Exh. 2; Tr. 21, 56.) Kuta, Chief Steward Rodney Davis, and committee person Graham Calderon represented the Union and Korn and Human Resources Director Elaine
20 Deusterhoff represented Respondent. (Tr. 56.) At this session, the Union provided Korn with a list of proposals for changes to the previous contract. (Jt. Exh. 2f.) There is no evidence that Respondent provided any proposals to the Union at the first session. The meeting lasted about 45 minutes to 1 hour and no tentative agreements were reached. (Tr. 26, 57.)

25 Kuta asked to schedule another bargaining session, but Korn would not provide any dates or times. (Tr. 57.) Korn and Kuta did not discuss bargaining proposals between the first two sessions.⁸ (Tr. 58.)

C. August 5, 2013 Session

30 The parties met for a second bargaining session at Respondent's Burnsville facility on August 5, 2013. (GC Exh. 2; Tr. 58.) Kuta and Davis represented the Union at this session and Korn and Deusterhoff represented Respondent.⁹ (Tr. 58.) Many members of the bargaining unit were present for this bargaining session. (Tr. 58.) None of the unit members had asked Kuta to
35 be present for this session, instead, the unit was present because Korn had directed Deusterhoff to post a notice informing the bargaining unit of the upcoming session and inviting them to

⁷ It was clear from the evidence and demeanor of Kuta and Korn at the trial that they do not like each other. For example, Korn testified that Kuta "lies and creates an unhappy workforce." (Tr. 23.) In correspondence, Korn described Kuta as, "seemingly . . . incapable of telling the truth." (Jt. Exh. 2p.) Kuta frequently appeared exasperated with Korn and sparred with him during cross-examination. (Tr. 146-147.)

⁸ The parties have stipulated that there are no tentative agreements or correspondence between the parties other than those items contained in Jt. Exhs. 1-8. (GC Exh. 3.)

⁹ I do not credit the testimony of Union Steward Darryl Johnson that he was present for the Union at this session. In his pretrial affidavit, Johnson averred that he was not yet a union steward on that date and participated in the session as an audience member. (Tr. 211-212.)

attend.¹⁰ (Tr. 32, 117.) The Union was unhappy about the presence of the unit and had not agreed to the unit's presence prior to the meeting. (Tr. 32, 58.) However, Korn insisted that the only meetings that would take place at his facility would be with the unit present. (Tr. 59.)

5 After the parties began discussing proposals, the audience began asking questions and making remarks.¹¹ (Tr. 59.) Kuta described Korn's behavior as "playing the crowd." Id. Kuta objected to the presence of the employees because the members had elected officials to represent them in negotiations. (Tr. 116-117.) However, Korn demanded that if the parties were to negotiate at the Burnsville facility, it would be with the unit present. (Tr. 59.) Kuta took notes at
10 the meeting; no one took notes on behalf of Respondent. (GC Exh. 4; Tr. 60.)

Respondent presented the Union with only three written proposals at this meeting. Respondent's proposals were: increases to salaries will be merit based; health insurance costs are increasing and the Company will share this burden with union employees in a manner consistent
15 with all other company employees; and "open shop."¹² (Jt. Exh. 21.) The Union did not present additional written proposals at this meeting.

The Union agreed to drop some of its proposals at this session, including proposals regarding vacation pay hours on paychecks, and an allowance for boots. (Tr. 60.) The parties did not reach
20 any tentative agreements at this session. (Tr. 26, 61.) At the end of the meeting, Kuta again asked Korn for further dates and times to bargain, but Korn would not provide any. (Tr. 61.)

D. Events Subsequent to the August 5, 2013 Session

25 Following the August 5, 2013 meeting, the parties communicated by way of fax to schedule subsequent bargaining sessions. (Jt. Exhs. 2m-t.) Initially, the Union demanded responses to the written proposals it had made. (Jt. Exh. 2m.) The Union also sought clarification on Respondent's proposals. Id.

30 On August 16, Korn sent Kuta a letter reaffirming his position that it is in, "everyone's best interests that our meetings are open to all union members [because of your] propensity to lie and misrepresent what I say." (Jt. Exh. 2t.) Korn also indicated that Kuta needed to replace committeeperson Graham Calderon, who had resigned, before the parties met again. Id. Kuta and Respondent then exchanged numerous pieces of correspondence attempting to set a date for
35 further bargaining. (Jt. Exhs. 2u-x.)

On September 9, Korn sent Kuta the results of an employee poll taken at his direction by Union Steward Rodney Davis. (Jt. Exh. 2y.) The employee poll included all of Respondent's proposals, and the employees endorsed Respondent's merit-based increases and two insurance
40 proposals. Id. The unit overwhelmingly rejected the idea of an open shop. Id. Korn sought to

¹⁰ To the extent that Korn's testimony on this point contradicted his pretrial affidavit testimony, I credit Korn's affidavit testimony and find that he directed Deusterhoff to post the notice. Korn's affidavit was given on November 5, 2013, only 3 months after the events at issue.

¹¹ Korn admitted asking employees in the audience questions during this session, (Tr. 23.)

¹² Kuta repeatedly asked Korn to clarify the factors Respondent would use to determine merit-based increases. (Jt. Exhs. 2bb, dd, ee.) It does not appear that Korn ever provided this information to the Union.

leverage the Union to change its insurance proposal to include Respondent's insurance as an option as a result of this poll. (Jt. Exhs. 2aa, dd.) A barrage of letters followed regarding bargaining and the proposals of the parties. (Jt. Exhs. 2z-mm.) In mid-October 2013, Korn stated that he had gone directly to the employee members of the Union's bargaining committee regarding dates for bargaining. (Jt. Exh. 2ll.)

E. Cancellation of the October 21, 2013 Session and the Filing of Charges

A bargaining session was scheduled for October 21, 2103, at Respondent's Burnsville facility, but it was cancelled by Kuta. (Jt. Exh. 2nn; GC Exh. 3; Tr. 61.) Kuta had previously advised Korn that he would meet for bargaining if the bargaining teams of Respondent and the Union were the only persons present. (Tr. 61-62.) More specifically, Kuta objected to the presence of the entire bargaining unit at negotiations. (Tr. 116-117.) Despite Korn's expressed understanding of this request in a letter, he had again posted a notice inviting the entire unit to attend the session.¹³ (Jt. Exh. 2t; Tr. 61-62.) Kuta learned of this on his way to the October 21, 2103 session and canceled it by leaving a message for Korn. (Tr. 61-62.) In his message, Kuta specifically stated that he was cancelling the session because he did not want the employees present. (Tr. 32.) Korn played Kuta's message cancelling the session to the employees assembled at Respondent's facility for the bargaining session.¹⁴ (Tr. 32.)

Korn faxed a letter to Kuta on October 22, 2013, stating, in part, that, "We mistakenly assumed that you would appreciate having your union brothers in the room to support your efforts to secure a new contract. I know they appreciated being able to witness your expert negotiation skills at our last meeting." (Jt. Exh. 2nn; GC Exh. 3.) Korn went on to state that "[n]ow that you have made it clear that you will not permit your union brothers to be in the room with you during our contract negotiations, we will of course acquiesce to your demand that we exclude your union brothers from the room while we discuss issues that are so important to them and their families." Id.)

Thereafter, the Union filed a charge with the Board on October 23, 2013, alleging that Respondent was not bargaining in good faith. (GC Exh. 5.) The Regional Director found merit to the Union's allegations and the Union subsequently filed an amended charge on December 19, 2013. (GC Exhs. 5, 6; Tr. 63.) Respondent also filed a charge with the Board against the Union alleging a refusal to bargain in good faith, but it does not appear that a determination was made on this charge.¹⁵ (GC Exh. 7; Tr. 65.) Respondent placed bargaining on hold for 2 months while it submitted evidence to the Region regarding the charge filed by the Union. (Jt. Exhs. 2oo, qq, rr.)

¹³ In his letter of August 20, 2013, Korn stated, "If you insist that the meetings be closed to Union members we can agree to this request. . ." (Jt. Exh. 2t, p. 2.)

¹⁴ Although Korn denied playing the message in front of the employees, he admitted doing so after being confronted with his pretrial affidavit in which he stated, "I listened to [Kuta's] message in front of everyone that was there." (Tr. 32-33.)

¹⁵ Although Kuta testified that he was told that the Region found no merit to Respondent's charge, Respondent later agreed to withdraw the charge on January 10, 2014. (Jt. Exh. 3a.) Thus, it appears that the charge was still been pending on that date.

Despite being told that Kuta did not want unit employees at bargaining sessions, and acknowledging that fact in writing, Korn created a document entitled, “Temp-Air Seniority List” and provided it to Daryl Johnson, an employee and union steward.¹⁶ (Jt. Exh. 2nn; GC Exh. 10; Tr. 27-28; 212.) Korn asked Johnson to poll Respondent’s employees as to whether they wanted to be present for bargaining sessions. (Tr. 28, 213.) At the top of the second page of the list, in bold and underlined type, Respondent asks, “Should Mike Kuta allow those union employees who want to be present in the training room to observe contract negotiations . . . to be present in the training room to observe the contract negotiations?” (GC Exh. 10.) After polling the employees and indicating their preference on the face of Joint Exhibit 10, Johnson returned the document to Korn. (Tr. 213.) According to the notations on the Seniority List, a majority of the unit employees expressed a desire to be present for bargaining sessions. (GC Exh. 10.)

F. January 10, 2014 Session

The parties met for a third bargaining session on January 10, 2014, this time with a mediator at the Federal Mediation and Conciliation Service (FMCS) office in Minneapolis. (GC Exh. 2; Tr. 66.) Korn attended this session for Respondent and Kuta, Davis, and Steward Darryl Johnson attended on behalf of the Union. (Tr. 66.) The parties agreed to add grandparents to the funeral leave provision of the contract, Respondent sharing health insurance costs “in a manner consistent with all other company employees,” annual wage increases, and a contract length of 3 years. (Jt. Exh. 3b.) Additionally, the parties agreed to incorporate language from the contract that expired in 2013 (Exhibit A) concerning wage rates into the new contract. (Jt. Exh. 3b; Tr. 67.) A tentative agreement was reached at that session, which was reduced to writing and signed by Korn and Kuta. (Jt. Exh. 3b.)

The tentative agreement was made subject to ratification by both parties. (Jt. Exh. 3b.) Kuta testified that he was not concerned about ratification because the tentative agreement embodied what the unit had asked for in its meeting with Kuta prior to the first bargaining session. (Tr. 72.)

As a condition of reaching this tentative agreement, both parties agreed to dismiss their then-pending Board charges. (Tr. 65.) Withdrawal requests were faxed by both parties from the FMCS office to the Regional Office on January 10. (GC Exh. 3a.)

G. Bargaining Unit Fails to Ratify the Tentative Agreement

Within a week of reaching the tentative agreement, the Union held a ratification vote for the bargaining unit. (Tr. 71-72.) Kuta explained the terms of the agreement at length to the unit. (Tr. 72.) Much to Kuta’s surprise, the tentative agreement was overwhelmingly rejected. (Tr. 72.)

After the meeting, Kuta asked some of the unit members why they had rejected the tentative agreement. (Tr. 72.) He was told that the word on the floor was that if the unit ratified the contract, they would not receive an end-of-the-year bonus valued at \$500 to \$3000 per employee. (Tr. 72-73.) The employees further advised Kuta that they wanted merit increases only, as opposed to the progressive increases included in the tentative agreement. (Tr. 73.) Kuta advised

¹⁶ A date stamp on the Seniority List indicates that it was printed on October 28, 2013. (GC Exh. 10.)

Korn of the result of the ratification vote and the parties scheduled another bargaining session for February 7. (Tr. 73.)

H. February 7 Session Tentative Agreement and Ratification

The parties met for another bargaining session on February 7 at the FMCS office in Minneapolis. (GC Exh. 2; Tr. 73-74.) Korn was present for Respondent and Kuta, Davis, Johnson, and Secretary-Treasurer Scott Gelhar were present for the Union.¹⁷ (Tr. 73.) The only issue to be negotiated at this session was the method by which employees would receive pay increases, as all other issues had been agreed to at the previous session.¹⁸ (Tr. 34-35.)

The parties reached a new tentative agreement at this session. (Jt. Exh. 4a.) This tentative agreement stated as follows:

- 1) Funeral Leave – add Grandparents[.]
- 2) Contract length 3 years[.]
- 3) Health Insurance: costs are increasing and the company will share this burden with the union employees in a manner consistent with the [other] employees.
- 4) All Union employees will be eligible for a year-end bonus and merit increases in the same way other Temp-Air employees would be.

(Jt. Exh. 4a.)

Kuta's uncontroverted testimony establishes that Korn provided Kuta with a copy of an annual performance evaluation for nonsupervisory Temp-Air employees at the bargaining session of February 7. (U. Exh. 1; Tr. 160-161.) Kuta further testified, without contradiction, that Korn explained that Respondent bases its employee merit increases and bonuses on these evaluations.¹⁹ (Tr. 160-161, 173.)

¹⁷ I do not accept Johnson's testimony regarding what transpired at the January 10 or February 7 sessions. Johnson's trial testimony was contradicted by his affidavit testimony regarding his presence at the January 10 session, the procedure for sending annual performance evaluations to human resources, and his presence at the August 2013 bargaining session. He also gave vague and qualified testimony, such as, "I believe, to the best of my knowledge, it had [to do with] an incident . . ." and "word-for-word, I cannot [recall what Korn said]." (Tr. 199, 200.) Johnson also denied giving a copy of his pretrial affidavit to Korn, but Korn had the affidavit in his hand at the trial. Given the lack of specificity and candor on Johnson's part at the trial, I generally do not credit his testimony.

¹⁸ Although Korn denied this fact at trial, he gave testimony in his pretrial affidavit to this effect. I credit Korn's affidavit testimony over his trial testimony. The affidavit was given on June 11, only 4 months after the events at issue, when his memory of the events would have been fresher.

¹⁹ I decline to discredit Kuta's testimony regarding annual performance evaluations based upon an email allegedly sent by employee Rick Meyer to Korn in January 2014 in which Meyer stated, "The criteria I use for merit raises is based on the performance of the employee." (R. Exh. 2.) Meyer, for his part, believed that the document pertained to 2010 negotiations. (Tr. 181.) Additionally, I note that none

Respondent's human resources manager, Elaine Deusterhoff, presented extremely limited trial testimony. Although she was present for some of the bargaining sessions, she gave no testimony about what occurred at those sessions. Deusterhoff testified that she processes salary increases for Respondent. (Tr. 191.) As to how this is done, she testified that "sometimes a supervisor or a lead will come to me and say, 'I would like to recommend so-and-so for an increase.'" (Tr. 192.) Then, in response to a leading question by Korn, she testified that employees do not receive merit increases based on annual performance evaluations. Id. I do not credit Deusterhoff's testimony on this point because it was cursory, uncertain, and was given in response to a leading question. As Respondent's human resources manager, Deusterhoff did not directly or satisfactorily explain how these increases are given. Furthermore, neither she nor any of Respondent's witness provided any documentary evidence as to how these increases are processed. As such, I credit Kuta's testimony that merit increases are given based on annual performance reviews.

The Union agreed to recommend ratification of the tentative agreement to its members. Id. Korn admitted that he understood that if the agreement was ratified by the bargaining unit, its terms would be incorporated into the expired contract. (Jt. Exh. 1; Tr. 37.) The tentative agreement was signed by Korn, Kuta, Davis, and Johnson on February 7. Id. All agreements reached between the parties are contained in the tentative agreement at Joint Exhibit 4a.²⁰ (Tr. 78.)

For the ratification vote on the contract, Kuta presented the members with a document entitled, "Final Contract Proposal from Temp-Air to Local 970." (R. Exh. 1.) The content of the document regarding what was agreed to by the parties is identical to a tentative agreement signed on February 7. (Jt. Exh. 4a.) There are few differences between Joint Exhibit 4a and Respondent's Exhibit 1. Kuta admitted that in creating Respondent's Exhibit 1 he used Korn's signature from "somewhere else." (Tr. 140.) The bargaining unit voted to ratify the February 7 agreement on February 13.²¹ (Tr. 78.)

of Respondent's witnesses contradicted Kuta's testimony regarding what was said regarding performance evaluations at the February 7 bargaining session or that Korn gave a copy of an annual performance evaluation to Kuta at the February 7 session.

²⁰ The parties did not discuss or agree to any changes to the sections of the expired contract regarding employee discipline or discharge procedures (sec. 8.11(a)) or the use of supervisors to perform unit work (sec. 3.06). Furthermore, the document (Jt. Exh. 4a) does not reflect that it required ratification by Respondent's board of directors, however, it implies that the Union's members needed to ratify the agreement as it states, "These proposals will come with a Committee Recommendation."

²¹ I find Kuta's use of R. Exh. 1, as opposed to Jt. Exh. 4a, for the ratification vote inconsequential. Initially, I note that the substance of the tentative agreement voted on by the bargaining unit is unchanged. The only differences between Jt. Exh. 4a and R. Exh. 1 are: the date; the title; the words "Tentative Agreement" appear on Jt. Exh. 4a, but not on R. Exh. 1; and, the signatures of Korn and Johnson appear different. Nevertheless, the Union's members voted on, and ratified, the four items contained in Jt. Exh. 4a and R. Exh. 1 on February 13.

I. Events Subsequent to Ratification

Subsequent to ratification by the unit, Kuta made the agreed-upon changes to the 2010-2013 contract and sent a redlined copy to Korn for his review. (Jt. Exh. 5a; Tr. 79.) Kuta also prepared a clean copy of the contract with the agreed-to changes incorporated, signed it, and sent it to Korn for his signature. (Jt. Exh. 5b; Tr. 79.) In the contract prepared by Kuta for Korn's signature, the following language was used:

Sec. 13.01 All Union employees will be eligible for a year-end bonus and merit increases in the same way other Temp-Air employees would be – annual performance evaluation.²²

Sec. 15.02 Employees who are in the employment of the Employer on the effective date of this Agreement and who have completed 90 days of employment by the effective date are eligible for coverage under the [Minnesota Teamsters Health and Welfare] Plan on the effective date. Employees who are in the employment of the Employer on the effective date of this Agreement but who have not completed 90 days of employment by that date shall become eligible for coverage under the Plan on the first Monday following the Employee's completion of 90 days of employment. An employee hired after the effective date of this Agreement shall become eligible for coverage not earlier than the first Monday following the Employee's completion of 90 days of employment.

Health Insurance costs are increasing and the Company will share this burden with Union employees in a manner consistent with other Temp-Air employees.

During the term of this Agreement for the contract years beginning on the dates stated: August 1, 2013 through August 1, 2105 (sic).

(Jt. Exhs. 5a and b.) The specific contribution amounts previously contained in section 15.01 were removed by Kuta. Id. The language of sections 3.06 and 8.11(a) was unchanged from that contained in the expired agreement. Id. The versions of the agreements sent by Kuta to Korn for signature contain other errors regarding the effective dates, in that the ending date of the new contract is listed in places as July 31, 2015.²³ (Jt. Exhs. 5a and b, pp. 19 and 21.)

In addition, Kuta deleted sections 13.01 and 13.02, which made reference to the wage scale in Exhibit A from the expired contract. As the February 7 tentative agreement contained provisions for merit-based increases, instead of the annual wage scale increases provided for in Exhibit A, these provisions were no longer applicable. (Tr. 171.) Kuta further deleted Exhibit B from the expired contract, as it had expired by its own terms and was not consistent with the merit-based increases that the parties had agreed to on February 7. (Jt. Exhs. 5a, b, and, 20, p. 2; Tr. 107-108, 165-166.) Kuta also deleted the table from section 15.02 because no agreement was

²² Kuta admitted that the tentative agreement on this section (Jt. Exh. 4a) does not contain the words "annual performance evaluation." (Tr. 124.) However, Kuta testified, without contradiction, that Korn explained on February 7 that these evaluations are used to determine bonuses and increases. (Tr. 173.)

²³ Kuta also forgot to change the effective dates of the agreement in sec. 16.01. (Jt. Exhs. 5a and b, p. 20.)

reached on amounts to fill the table, as Korn would not provide such figures. (Tr. 169-171.) Instead of using a table, Kuta inserted the language from the February 7 tentative agreement into section 15.02, as above. (Jt. Exhs. 5a and b.)

5 About 3 to 4 weeks later, Kuta received a fax from Respondent containing a vastly different version of the contract. (Jt. Exh. 6; Tr. 80.) Several items were crossed out in Respondent's version and Kuta did not know why, as the parties had not discussed the changes made by Respondent. (Tr. 80.) The changes made by Respondent relevant here were:

10 Section 3.06 [renumbered 3.07] Company employees shall be permitted to perform manufacturing and/or service work when necessary to meet the business needs of the Company.

15 Sec. 8.11(a) The Company will provide a copy of any written warning notice, including a suspension notice or any other progressive disciplinary notice, to the Employee and the Chief Steward within five working days of the event giving rise to the disciplinary action, whichever occurs later. If the investigation of the incident requires more than five working days, the Company will notify the steward of that fact. Company Employees who are leadpersons shall have
20 authority to initiate and participate in the discipline and/or discharge process of Employees. Initiate and participate means includes but is not limited to leadpersons submitting corrective action forms to the Human Resources manager and/or such leadperson's manager.

25 Section 13.01 Employees will be eligible for year-end bonuses. All bonuses shall be at the sole discretion of the Company. Employees shall be eligible for increases to their base pay based on merit. The Company shall have sole discretion to determine the factors use[d] in determining any merit increase to any Employee. The Company shall not deny a year-end bonus or merit increase to
30 any Employee based on such Employee's membership in the Union.

35 Sec. 15.02 Employees who are in the employment of the Company on the effective date of this Agreement and who have completed 90 days of employment by the effective date are eligible for coverage under the [Minnesota Teamsters Health and Welfare] Plan on the effective date. Employees who are in the employment of the Company on the effective date of this Agreement but who have not completed 90 days of employment by that date shall become eligible for coverage under the Plan on the first Monday following the Employee's completion of 90 days of employment. An employee hired after the effective date
40 of this Agreement shall become eligible for coverage not earlier than the first Monday following the Employee's completion of 90 days of employment.

45 During the term of this Agreement, the Company shall submit to the Union \$173.70 per week for each Employee covered under the Plan. The Union shall not reduce any benefits under the Plan without 60 days prior written notice to the Company. If the Union reduces any benefits under the Plan the Company shall reduce its contribution to the Plan accordingly. During the term of this

Agreement if the Company increases its contribution to the Company's portion of Company employees' insurance, the Company shall increase its contribution to the Plan in a manner consistent with such increase to other Company employees. All such increase[s], whether to the Plan or otherwise, shall be at the sole discretion of the Company.

(Jt. Exh. 6.)

Thus, in section 3.06 (renumbered 3.07) Respondent changed the words "supervisors" to "company employees" and "Employer to "Company."²⁴ Respondent further added language to section 8.11(a) giving authority to leadpersons to initiate discipline and participate in the discipline and/or discharge of other employees. Respondent changed section 13.01 giving Respondent the sole discretion to determine the factors used for merit-based increases. Additionally, Respondent added language to section 15.02 requiring the Union to give Respondent 60 days' written notice before reducing any health insurance benefits available to Respondent's employees and prohibiting the Union from reducing health insurance benefits without a resulting decrease in contributions by Respondent. (Jt. Exh. 6; Tr. 84.) Korn also corrected Kuta's mistakes regarding the length of the agreement.²⁵ (Jt. Exh. 6, pp. 19, 20.)

Shortly thereafter, Kuta sent a letter to Respondent, asking about changes that were not discussed or negotiated and demanding that the changes made by Respondent be removed. (Jt. Exh. 7a; Tr. 80.) Korn responded to Kuta's letter on April 7, explaining his reasons for making the above changes; however, Korn did not agree to rescind any of them. (Jt. Exh. 7b.) Kuta sent another letter to Respondent on April 22, again stating that the only changes that should have been made to the contract were those agreed to at negotiations. (Jt. Exh. 7c.) On April 23, Respondent replied to Kuta's April 22 letter by resending its April 7 letter. (Jt. Exh. 7d.)

Kuta later conferred with the Union's attorney, Kevin Beck, and agreed to some of Respondent's changes. (Jt. Exh. 8a; Tr. 82.) Beck sent a letter to Korn on July 30, attaching a redlined copy of the contract containing the changes made by Respondent to which the Union would agree. (Jt. Exh. 8b.) The Union agreed to replace the word "employer" with "company" throughout the agreement and to the inclusion of the specific amount of Respondent's contribution to employee health insurance costs (\$173.70 per week) in section 15.02. (Jt. Exh. 8a.) The Union changed the language of Respondent's proffered section 13.01 to, "All Union employees will be eligible for a year-end bonus at the sole discretion of the Company. Union [e]mployees shall be eligible for merit increases in the same way other Temp-Air employees would be based upon an annual performance review." (Jt. Exh. 8b.) However, the Union specifically did not agree to the following changes: (1) allowing leadpersons, who are unit members, to participate in the discipline and discharge of other unit members; (2) language allowing Respondent the sole discretion in determining the criteria for merit-based increases; and (3) prohibiting changes in health insurance benefits without a reduction in Respondent's

²⁴ Respondent changed the word Employer to Company throughout the agreement. (Jt. Exh. 6.)

²⁵ Korn admitted that Respondent and the Union never reached any sort of agreement on the role of leadmen in discipline, that Respondent would have the sole discretion to determine the factors used for merit-based increases, or that the Union would provide 60 days' notice of health plan changes. (Tr. 41-44.)

contribution and requiring 60 days' notice before reducing health benefits.²⁶ (Jt. Exh. 8a.) Beck offered to withdraw the unfair labor practice charge giving rise to this case if Respondent agreed to execute the agreement contained at Joint Exhibit 8b.

5 Up to the present time, Respondent has refused to execute any written agreement with the Union based upon the tentative agreement reached over a year ago, on February 7, 2014. (Jt. Exhs. 4, 5a, b, and 8b.)

10 J. Amendments to the Complaint

During the trial, the General Counsel moved to amend the complaint to include two allegations: (1) a violation of Section 8(a)(1) of the Act by Korn, Respondent's CEO, for failing to give employee Rick Meyer assurances when seeking his participation in the trial as a witness, under *Johnnie's Poultry*; and (2) a violation of Section 8(a)(5) and (1) of the Act for
15 undermining and denigrating the Union. (Tr. 218-219.) Respondent opposed the amendment and denied the allegations. (Tr. 219.) I allowed the amendments to the complaint as the facts pled by the General Counsel came to light at the hearing and were fully litigated, and the General Counsel's motion was timely made.²⁷

20 The specific amendments were as follows:

Paragraph 4.5(a): On or about the end of October 2014, Respondent, by its CEO, Jim Korn, interviewed employees in preparation for the instant hearing without
25 informing them of the purpose of the interviews, that their participation was voluntary, and that no reprisals would take place.

Paragraph 4.5(b): By the conduct listed above in paragraph 4.5(a), Respondent has restrained, coerced, and interfered with . . . employees' Section 7 rights, in violation of Section 8(a)(1) of the Act.

30 Paragraph 10.5: By the conduct described above, [in] complaint paragraph 9, the Respondent has undermined and denigrated the Union's status as the collective bargaining agent, in violation of Section 8(a)(5) of the Act. (Tr. 218.)

35 At the hearing, employee Rick Meyer testified that Korn asked him, "if [he] would come up here and testify." (Tr. 184.) Korn did not tell Meyer what he wanted Meyer to testify about, what to say if he testified, or anything specific about the proceeding or Meyer's role in it. (Tr. 184-185.) Korn did not promise Meyer anything for his testimony. (Tr. 186.) Korn did not

²⁶ Although not referenced in Beck's letter, the Union did not agree to Respondent's changing of the word "supervisor" to "company employee" in sec. 3.06, as the version of the contract attached to Jt. Exh. 8a contains the word "supervisor" in that section. (Jt. Exh. 8b.)

²⁷ A judge has wide discretion to grant or deny motions to amend complaints under Sec. 102.17 of the Board's Rules and Regulations. *Bruce Packing Co.*, 357 NLRB No. 93, slip op. at 2 (2011). In determining whether that discretion has been properly exercised, the Board evaluates (1) whether there was surprise or lack of notice, (2) whether there was a valid excuse for the delay in moving to amend, and (3) whether the matter was fully litigated. *Rogan Bros. Sanitation*, 362 NLRB No. 61, slip op. at 3 fn. 8 (2015).

assure Meyer that nothing bad would happen to him if he testified. (Tr. 185.) This conversation took place at work with no other employees present. (Tr. 184.) Thus, the substance of this conversation was that Korn asked Meyer to come to the trial and testify and Meyer said that he would.²⁸ (Tr. 185.)

Furthermore, at the trial, the General Counsel moved to amend to the complaint to include the special remedy of notice reading. (Tr. 8.) None of the other parties objected to this amendment and I granted the General Counsel's request. Id.

K. *Post-trial Motions*

On December 12, the General Counsel sent a letter indicating that she intended to file a Motion to Strike and seeking permission to file an answering brief.²⁹ On December 16, the General Counsel moved to strike portions of Respondent's brief and noted that Respondent had not properly served its brief on the General Counsel or the Union. (ALJ Exh. 2.) The General Counsel indicated that Respondent's brief contained several factual assertions and arguments that were not contained in the record. Id. Upon reviewing the General Counsel's motion, I ordered Respondent to serve a response to the General Counsel's motions by December 29, a date later extended to January 9, 2015. (ALJ Exhs. 3 and 4.)

Respondent opposed the General's Counsel's request to file an answering brief, arguing that such briefs are not permitted under the Board's Rules and Regulations. (ALJ Exh. 5.) Respondent further argued that such a brief would delay a decision and that the record is "more than sufficient" for a decision. Id. As to the General Counsel's Motion to Strike, Respondent did not specifically address the motion, but instead chose to argue, as it had in its brief, about facts outside of the record. Id.

Although I did not rule on these motions at the time they were filed, I deny the General Counsel's motion to file a reply brief and I grant the General Counsel's motion to strike. Any portions of Respondent's brief not supported by facts contained in the record of the trial have been disregarded. Reply briefs are not normally allowed at this stage in the proceedings. Board's Rules and Regulations, Section 102.42. The General Counsel has not pointed to any special need to deviate from this practice and, accordingly, her motion to file a reply brief is denied.

²⁸ In her brief, the General Counsel explained the theory of this violation as, "Respondent, through its agent Korn, violated the Act when it sought Meyer's participation in the hearing." (GC Br. p. 28.)

²⁹ I have added these documents to the record as follows: General Counsel's Request to File Answering Brief as ALJ Exh. 1; General Counsel's Motion to Strike Respondent's Brief in Part as ALJ Exh. 2; my order of December 18 as ALJ Exh. 3; my order of December 19 as ALJ Exh. 4, and; Respondent's Memorandum in Opposition to General Counsel's Motion to Strike and to File an Answering Brief as ALJ Exh. 5.

III. DISCUSSION AND ANALYSIS

A. Credibility Analysis

5 A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi Corp.*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd sub nom. *Daikichi Corp. v. NLRB*, 56 Fed. Appx. 516 (D.C. Cir. 2003).
 10 Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622. My credibility findings are incorporated into the findings of fact set forth above. However, given the less-than-reliable nature of much of the testimony at the trial, I have
 15 generally credited the documentary evidence and the testimony of Kuta.

B. Respondent Violated the Act by Failing and Refusing to Execute the Agreement with the Union

20 It is well settled that Section 8(d) of the Act imposes on the parties to a collective-bargaining relationship, once an agreement is reached, an obligation to execute that agreement at the request of either party. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). The existence of an agreement, and the terms of the agreement if one is found to exist, are questions of fact. *Metro Medical Group*, 307 NLRB 1184 (1992).

25 The obligation to execute a contract arises only if the parties had a “meeting of the minds” on all substantive issues and material terms of the agreement. *Sunrise Nursing Home*, 325 NLRB 380, 389 (1998). The General Counsel bears the burden of showing not only that the parties had the requisite meeting of the minds, but also that the document which the respondent refused to execute accurately reflected that agreement. *Windward Teachers Assn.*, 346 NLRB 1148, 1150 (2006). If it is determined that an agreement was reached, a party's refusal to execute the agreement is a violation of the Act. *Windward Teachers Assn.*, 346 NLRB at 1150, citing *H. J. Heinz Co.*, 311 U.S. at 525-526.

35 The expression “meeting of the minds” is based on the objective terms of the contract, not the parties' subjective understanding of those terms. *Hempstead Park Nursing Home*, 341 NLRB 321, 322 (2004). Therefore, subjective understandings, or misunderstandings, of the meaning of terms that have been agreed to are irrelevant, provided that the terms themselves are unambiguous when judged by a reasonable standard. *Hempstead Park Nursing Home*, 341
 40 NLRB at 322. Where misunderstandings may be traced to ambiguity for which neither party is to blame, or for which the parties are equally to blame, and the parties differ in their understanding, their seeming agreement will create no contract. *Id.* citing *Meat Cutters Local 120 (United Employers, Inc.)*, 154 NLRB 16, 26-27 (1965).

45 A meeting of the minds does not require that both parties have an identical understanding of the agreed-upon terms. *Windward Teachers Assn.*, 346 NLRB at 1150. Where the parties have agreed on the contract's actual terms, disagreements over the interpretation of those terms do not

provide a defense to a refusal to sign the contract. *Id.* citing *Teamsters Local 617 (Christian Salvesen)*, 308 NLRB 601, 603 (1992). Extrinsic or parol evidence has relevance in determining whether agreement or a meeting of the minds has been reached. *Diplomat Envelope Corp.*, 263 NLRB 525, 536 (1982).

I find that the parties had a meeting of the minds on February 7. The parties reached a tentative agreement at this session. There can be no dispute that the full extent of the parties' February 7 agreement was: to add grandparents to the funeral leave provision of the contract; to a contract length of 3 years; that Respondent would share the burden of health insurance costs with union employees in a manner consistent with other employees; and, that all union employees would be eligible for a yearend bonus and merit increases in the same way as other employees would be. (Jt. Exh. 4a.) These agreements were reduced to writing and signed by the parties that same day. Furthermore, Korn admitted that when this agreement was ratified by the employees, it would be incorporated into the expired contract, thus creating a new agreement. Accordingly, the only changes that should have been made to the expired agreement were those agreed to by the parties on February 7.

I did not find any evidence in the record that any of the terms of the February 7 agreement are ambiguous. If words and conduct chargeable to one or any party have but one reasonable meaning, with respect to which the other party has noted concurrence, a contract will be deemed concluded on that basis. *Pittsburgh-Des Moines Steel Co.*, 202 NLRB 880, 888 (1973). Korn signed the agreement on February 7. Korn signed a substantially similar agreement between the parties in January. The terms of the tentative agreement entered into by the parties on February 7 differed in only two respects from the tentative agreement of January 10: the provisions regarding wage increases and ratification. Korn did not, in any of the correspondence between the parties prior to the trial, express any concern that the terms of the new agreement are ambiguous. Respondent presented no evidence that the plain language contained in the February 7 agreement is ambiguous, or subject to more than one interpretation, in any way. Thus, after signing two similar agreements in January and February 2014, without any sort of objection that the language contained therein was ambiguous, I reject Respondent's argument that it need not execute the February 7 agreement because its terms are ambiguous.

The February 7 tentative agreement regarding wage increases states as follows, "All Union employees will be eligible for a year-end bonus and merit increases in the same way other Temp-Air employees would be." (Jt. Exh. 4a; R. Exh. 1.) The redlined and additional copy of the new agreement sent by Kuta to Korn for signature, however, contained the following language, "All Union employees will be eligible for a year-end bonus and merit increases in the same way other Temp-Air employees would be – annual performance evaluation." (Jt. Exhs. 5a and b.) Kuta admitted and the documentary evidence supports that the words "annual performance evaluation" did not appear in the tentative agreement reached on February 7. (Tr. 125-126.) However, Kuta added this language because it accurately reflected the agreement of the parties on February 7. (Tr. 173-174.)

Based upon my review of the evidence and record in this case, I find that the redlined agreement and additional copy sent by Kuta to Korn for signature accurately and completely reflect the terms agreed to by the parties on February 7. Despite Respondent's argument to the contrary, the General Counsel presented sufficient evidence that annual performance evaluations

are the vehicle by which Respondent's employees receive merit increases. Kuta's uncontroverted testimony establishes that Korn provided Kuta with a copy of an annual performance evaluation for nonsupervisory Temp-Air employees at the bargaining session of February 7. Kuta further testified, without contradiction, that Korn explained that Respondent
 5 bases its employee merit increases based on these evaluations. I do not view the inclusion of the additional language by Kuta as a material alteration to the understanding reached by the parties, but rather as a clarification of language to ensure that the document accurately reflected the meeting of the minds reached on February 7. Thus, I find that the language used by Kuta in the contracts sent to Korn on February 20 completely and accurately reflects the terms agreed to by
 10 the parties on February 7.

My finding on this point is further bolstered by Respondent's failure to mention this alleged inaccuracy in any of its correspondence with the Union after Kuta sent the complete contracts for signature on February 20. Respondent initially sent its version of the contract to the Union with
 15 no explanation of the changes made by Korn. (Jt. Exh. 6.) Later, in its explanation of the changes made, Respondent failed to state that annual performance evaluations are not the vehicle by which its employees receive increases or to object to executing the agreement on this basis. (Jt. Exh. 7b.) Respondent sent the Union no further explanation of its many changes to the contract in March 2014. Part of the obligation required by Section 8(d) of the Act to execute a
 20 contract agreed upon by the parties is the duty to assist in reducing the agreement to writing. *Kennebec Beverage Co.*, 248 NLRB 1298 (1980). Respondent took no action to attempt to comply with its duty to assist. For example, Respondent did not ask that Kuta remove the term "annual performance evaluation" from the version of the contract sent to Respondent for signature. Instead, Respondent sent the Union a vastly revised contract to sign. None of these
 25 changes were negotiated or agreed to by the Union in bargaining. (Tr. 43-44.)

I find Respondent's argument that it was justified in not executing the agreement due to errors regarding the contract's length unavailing. (R. Br. pp. 2-3.) Kuta testified that he made a mistake when stating that the contract was effective through July 31, 2015, at different places in
 30 the new agreement. (Jt. Exhs. 5a and b, p. 19, 20, 21; Tr. 163-164.) Generally, inadvertent errors do not excuse a complete refusal to execute an agreement previously reached. *Cannon Boiler Works*, 304 NLRB 457, 463 (1991), citing *Fashion Furniture Mfg.*, 279 NLRB 705 (1986). The Board has found that such errors do not indicate a lack of agreement between the parties and the need for minor alterations in the agreement does not relieve the parties of the obligation to
 35 execute the contract agreed to. *Id.* It is clear that Kuta's repeated reference to erroneous effective dates in the new agreement were inadvertent. (Jt. Exhs. 5a and b, pp. 19, 20, and 21.) I find that Respondent may not rely on these inadvertent errors as justification for refusing to sign the new agreement.

Respondent's argument that the parties did not have a meeting of the minds regarding health insurance costs in section 15.02 rings hollow. Korn signed the tentative agreement on February 7 agreeing only that "costs are increasing and the company will share this burden with the union employees in a manner consistent with the [other] employees." (Jt. Exh. 4a.) Kuta's
 40 uncontradicted testimony was that Korn would not provide numbers to put into the tables in section 15.02 of the expired agreement. In short, Korn created the alleged ambiguity about which he now complains. Kuta rightfully removed the tables from section 15.02 and inserted the language of the tentative agreement. Although Respondent argues that the failure to include
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actual dollar figures renders the contract ambiguous, I note that section 12.01 of the expired and new agreements provides a mechanism by which disputes over the meaning of the contract may be resolved. Furthermore, I do not find that any of the terms of the new agreement are ambiguous and no party offered any evidence at the trial as to how the new agreement might be ambiguous.

Additionally, I do not find Kuta's removal of sections 13.01 or 13.02 from the expired agreement improper or somehow repugnant to a meeting of the minds. Kuta removed these provisions because they were contrary to what the parties had agreed to on February 7. Where sections 13.01 and 13.02 of the expired contract contained reference to Exhibit A, which called for fixed annual increases, the section 13.01 inserted by Kuta into the new agreement makes reference to merit increases. (Jt. Exhs. 4a, 5a, 5b.) This new language reflects exactly what the parties agreed to on February 7. (Jt. Exh. 4a.)

Furthermore, the Union's agreement to some of the changes made by Respondent to the agreement subsequent to the ratification vote in February does not nullify that a meeting of the minds occurred. It is not unusual for parties to an agreement to discuss its terms, or even seek modification of its terms, after the arrival at an agreement. *Granite State Distributors, Inc.*, 266 NLRB 457, 461 (1983). The mere fact that the parties entertain modifications to the terms already agreed to in no way changes the fact that the agreement is still a binding and enforceable contract. *Teamsters Local 771 (Ready-Mixed Concrete)*, 357 NLRB No. 173, slip op. at 9 (2011). I do not find however, that the agreement embodied in Joint Exhibit 8b represents a new contract which Respondent must execute. The Union agreed to some, but not all of Respondent's changes. Furthermore, the Union changed some of the language proposed by Respondent in the revised contract sent to Korn for signature, such as at section 13.01. Therefore, I shall order that Respondent sign and execute the agreement contained at Joint Exhibit 5b, which was signed by Kuta and dated February 20, 2014 (with corrections to Kuta's inadvertent mistakes regarding the contract's effective dates).

Therefore, based upon the credible evidence in this case, I find that Respondent violated Section 8(a)(5) and (1) of the Act as alleged in paragraph 9 of the complaint by failing and refusing to execute the contract reflecting the agreement reached on February 7, 2014, as embodied in the agreement contained in the record at Joint Exhibit 5b.

C. Respondent Violated the Act by Undermining and Denigrating the Union

The Board has found that an employer violates Section 8(a)(5) and (1) of the Act by disparaging of a union by an employer by casting doubt in the minds of the membership as to the bona fides of the efforts of union representatives in advancing the interest of its members. *General Athletic Products Co.*, 227 NLRB 1565, 1575 (1977). An employer's efforts to portray the employer, rather than the union, as the workers' true protector may constitute an unfair labor practice. *NLRB v. United Technologies Corp.*, 789 F.2d 121, 134 (2d Cir. 1986.) See also *Formosa Plastics Corp.*, 320 NLRB 631, 632 (1996) ("An employer violates Section 8(a)(5) and (1) by . . . conduct that undermines a bargaining representative's statutory authority and denigrates the collective-bargaining relationship.") Additionally, an employer violates Section 8(a)(5) and (1) by other conduct which undermines a representative's statutory authority and derogates the collective-bargaining relationship. *Postal Service*, 268 NLRB 876, 877-878 (1984).

Korn's behavior during the course of negotiations with the Union demonstrates a pattern of denigrating and undermining the Union's status in the eyes of its members. On numerous occasions, Korn invited the entire bargaining unit to attend negotiations. During the bargaining session of August 5, 2013, Korn asked questions of unit members in the audience and played to the crowd. Later, after Kuta specifically objected to the presence of the entire unit at negotiations, Korn again invited the unit, resulting in the cancellation of a bargaining session. When Kuta left a message for Korn cancelling this session, Korn played Kuta's message for the assembled unit members. He later commissioned a poll of unit employees asking if they wished to be present for bargaining sessions. On one page of the poll, Korn indicates to the employees that it is Kuta who is preventing them from attending negotiations. Korn's objectives and disdain for the Union (particularly for Kuta) are best summarized in his sarcastic comment in his letter of October 22 to Kuta, "We mistakenly assumed that you would appreciate having your union brothers in the room to support your efforts to secure a new contract. I know they appreciated being able to witness your expert negotiation skills at our last meeting." (Jt. Exh. 2nn.) Korn's overall attitude toward the Union, and toward negotiations, evinces a desire to denigrate and undermine the Union. In engaging in this behavior, Korn clearly sought to drive a wedge between the unit and their exclusive collective-bargaining representative.

Furthermore, Korn has engaged in other behavior which would tend to denigrate and undermine the status of the Union in the eyes of the employees. Korn directed a poll of unit members regarding their opinions of Respondent's contract proposals on about September 9, 2013. (Jt. Exh. 2y.) By this action, Korn bypassed the Union and discussed contract proposals directly with unit employees. In addition, Korn used the results of this poll to attempt to force the Union to change its insurance proposal. He also went directly to employee-members of the Union's bargaining committee about setting dates for negotiations. Korn further delayed bargaining once because he thought that the Union should elect a new committeeperson first and a second time because he chose to submit evidence to the Board regarding an unfair labor practice charge filed by the Union, rather than fulfilling the duty to negotiate in good faith toward an agreement with his employees' representative. At least twice, Korn refused to provide further dates for bargaining, despite Kuta's requests. Korn's actions in repeatedly inviting unit members to negotiations also occasioned delays in bargaining.

By denigrating Kuta and the Union, Korn sought to portray Respondent, rather than the Union, as the true protector of employees' rights. All of this behavior would tend to diminish the status and approval of Kuta and the Union in the eyes of the bargaining unit and is exactly the sort of behavior that the Board has found violative of the Act. Therefore, I find that the General Counsel has established that Respondent has violated Section 8(a)(5) and (1) the Act as alleged in paragraph 10.5 of the complaint.

D. Johnnie's Poultry Allegation

The Board requires respondents to adhere to certain safeguards when interrogating an employee as part of its preparation for unfair labor practice litigation. *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied on other grounds 344 F.2d 617 (8th Cir. 1965). In *Johnnie's Poultry*, the Board held that despite the inherent danger of coercion, an interrogation of employees for the purpose of investigating facts raised in a complaint or in preparation of a

defense for trial is permitted, without a finding of a violation of Section 8(a)(1) of the Act. 146 NLRB at 775. However, a respondent enjoys this privilege only so long as it follows established, specific safeguards designed to minimize the coercive impact of such an interrogation. Id. Thus, the respondent must: (1) communicate to the employee the purpose of the questioning; (2) assure the employee that no reprisal will take place and obtain his or her participation on a voluntary basis; (3) question the employee in a context free from employer hostility to union organization and must not be itself coercive in nature; and (4) ensure that the questions do not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. Id. With the exception of extraordinary circumstances, the Board strictly follows these rules. *WXGI, Inc.*, 330 NLRB 695, 712 (2000), enf'd. 243 NLRB 833 (4th Cir. 2001).

The evidence relied upon by the General Counsel to prove the alleged *Johnnie's Poultry* allegation is insufficient to establish a violation of the Act. While it is true that Korn did not inform Meyer that his participation was voluntary or that there would be no reprisals, I find the limited evidence in the record fails to establish a *Johnnie's Poultry* violation. There was no indication that Korn "interrogated" Meyer for the purpose of "investigating facts raised in a complaint or in preparation of a defense for trial," or even asked Meyer any questions other than whether he would come to the trial and testify. Nothing in the single question posed by Korn indicated that it was related to Meyer's Section 7 rights. There is no evidence that Korn asked Meyer about the Union or any of the issues underlying the complaint in this case.

Therefore, on the facts contained in the record, I find no reasonable basis to conclude that Korn's single question to Meyer interfered with any rights protected by the Act. As Korn's question to Meyer was not an interrogation, the *Johnnie's Poultry* safeguards were not required. Accordingly, I shall recommend that the *Johnnie's Poultry* allegation, contained in paragraphs 4.5(a) and (b) of the complaint, be dismissed.

CONCLUSIONS OF LAW

1. Respondent, Temp-Air, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union, Teamsters Local 970, is a labor organization within the meaning of Section 2(5) of the Act.
3. At all relevant times, the Union has been the exclusive collective-bargaining representative of the following appropriate unit of employees: all full-time manufacturing and service employees of the Respondent located at its Burnsville, [Minnesota] facility.
4. Respondent and the Union reached complete agreement on February 7, 2014, concerning terms and conditions of a successor collective-bargaining agreement, and unit employees ratified the terms of this agreement on February 13, 2014.

5. By refusing, since on or about February 20, 2014, to execute the draft successor collective-bargaining agreement, which embodies the terms of the February 7, 2014, agreement, Respondent has engaged in acts violative of Section 8(a)(5) and (1) of the Act.

6. Since August 5, 2013, Respondent has undermined and denigrated the Union in violation of Section 8(a)(5) and (1) of the Act by insisting that employees observe bargaining sessions, polling employees, refusing to schedule bargaining sessions, and playing messages from union representatives for employees.

7. By engaging in the unlawful conduct set forth in paragraphs 5 and 6 above, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), and Section 2(6) and (7) of the Act.

8. Respondent has not otherwise violated the Act as alleged.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, Respondent shall be ordered to cease and desist from refusing to sign the agreement reached on February 7, 2014, and sent to Korn for signature on about February 20, 2014 (Jt. Exh. 5b, with corrections to Kuta's inadvertent mistakes regarding the contract's effective dates) and from undermining and denigrating the Union.

I decline to order, as sought by the General Counsel, that the notice in the case be read aloud to Respondent's employees. The Board has long required an offending party to post a notice describing employee rights under the Act and promising to abide by those rights. *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1 (1935). Requiring an owner or high official of a company or a union to actually read aloud the notice to its assembled employees has not been typically required except in unusual circumstances. *Dynawash*, 362 NLRB No. 53, slip op. at 8 (2015). For example, in *Federated Logistics & Operations*, 340 NLRB 255, 256-257 (2003), the Board described this as an "extraordinary" remedy. *Id.* In that case, the Board ordered several extraordinary remedies, including a notice reading where the employer: unlawfully interrogated employees; created the impression of surveillance; solicited grievances; promised benefits; threatened employees with the loss of existing benefits; threatened to move its operations; withheld benefits; and discriminatorily suspended employees for engaging in protected activity. *Id.* In the instant case, I do not find that Respondent's violations rise to the level of those in which the Board has ordered the extraordinary remedy of notice reading.

Furthermore, the cases cited by the General Counsel in support of her request for a notice reading are distinguishable from the instant case. Both *McAllister Towing & Transportation Co.*, 341 NLRB 394, 400 (2004), and *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 1 fn. 2 (2014), involved employee discharges, the overturning of elections, and the ordering of rerun elections. None of these circumstances is present in this case. Therefore, I find that the General Counsel has not offered sufficient evidence to establish that a notice reading is necessary in this case and I shall instead order the Board's standard remedy of a notice posting.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁰

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ORDER

The Respondent, Temp-Air, Inc, Burnsville, Minnesota, its officers, agents, successors, and assigns, shall

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1. Cease and desist from

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(a) Failing and refusing to bargain with the Union in good faith by refusing to execute the successor collective-bargaining agreement that was submitted to it by the Union embodying the terms agreed to on February 7, 2014, and ratified by the employees on February 13, 2014.

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(b) Undermining and denigrating the Union or union representatives to employees by any means, including by: insisting that employees observe bargaining sessions; polling employees; refusing to schedule bargaining sessions, and; playing messages from union representatives for employees.

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(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Execute the collective-bargaining agreement, dated February 20, 2014, embodying the terms reached with the Union on February 7, 2014, and ratified by the employees on February 13, 2014 (with corrections to Kuta's inadvertent mistakes regarding the contract's effective dates), for all employees in the following appropriate bargaining unit: all full-time manufacturing and service employees of the Respondent located at its Burnsville, [Minnesota] facility.

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(b) Within 14 days after service by the Region, post at its facility in Burnsville, Minnesota copies of the attached notice marked "Appendix."³¹ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an

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³⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 5, 2013.

- (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that paragraphs 4.5(a) and (b) of the complaint are dismissed.

Dated, Washington, D.C. May 19, 2015

Melissa M. Olivero
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with the Union in good faith by not reducing to writing and signing a collective-bargaining agreement reached with the Union, embodying the terms agreed to on February 7, 2014, and ratified by employees on February 13, 2014.

WE WILL NOT undermine or denigrate your Union or union representatives to you by any means, including by: insisting that employees observe bargaining sessions; polling employees; refusing to schedule bargaining sessions, and; playing messages from union representatives for employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL execute a collective-bargaining agreement embodying the terms reached with the Union on February 7, 2014, and ratified by employees on February 13, 2014, for all employees in the following appropriate unit: all full-time manufacturing and service employees of the Respondent located at its Burnsville, [Minnesota] facility.

TEMP-AIR, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

Minneapolis Federal Office Building, 212 Third Avenue, South Suite 200, Minneapolis, MN 55401
(612) 348-1757, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/18-CA-128364 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (612) 348-1770.